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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANKLIN JASPER WILSON,

Defendant and Appellant.

E032534

(Super.Ct.No. FVA09263)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael R. Libutti, Judge. Affirmed as modified.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Raquel M. Gonzalez, Supervising Deputy Attorney General, and Quisteen S. Shum, Deputy Attorney General, for Plaintiff and Respondent.

This second appeal in this case follows a remand for resentencing on count 1, kidnapping with intent to commit a crime, and dismissal of count 5, residential robbery. Defendant Franklin Jasper Wilson contends that we must reverse the current sentence because imposition of consecutive terms for counts 1, 4 (residential robbery), 8 (ATM robbery), and 9 (carjacking), constitutes impermissible dual punishment under Penal Code section 654.<sup>1</sup>

We conclude defendant's claims are meritless with the exception that defendant's sentence for count 4 must be stayed under section 654. Otherwise we affirm the judgment.

#### 1. Facts and Procedural Background

Between midnight and 1:00 a.m., on February 28, 1998, an armed man broke into Cedric and Ja'veon Satchell's apartment by kicking in the front door. At the time, Cedric's wife, Ja'veon, was home alone. The armed man let defendant in through the patio door. Defendant took the gun, shrouded Ja'veon's head with a cover, and demanded money. The men ransacked the apartment. Ja'veon helped them in order to convince them there was no hidden money. At defendant's insistence, she then called Cedric at work and, as a ruse, asked him to come home because she was sick.

Cedric arrived home and felt a gun placed against his neck as he approached the front door. Defendant searched Cedric and took his truck keys, wallet, pocketknife, and

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

pen. Cedric knew defendant from having dated his sister four years earlier. Once or twice Cedric had loaned his truck to defendant or his sister.

After emptying Cedric's pockets, defendant demanded more money. At gunpoint, defendant told Cedric to get some money from his mother. At about 2:30 a.m., while defendant's companion guarded Ja'veon, defendant drove Cedric to Cedric's mother's home. Defendant drove Cedric's truck. En route, they passed some police officers and defendant threatened to shoot Cedric if he said anything to them. While at Cedric's mother's home, defendant stayed in the truck while Cedric woke his mother and obtained \$40, which he gave to defendant when Cedric returned to the truck. They drove back to Cedric's apartment.

A few minutes later, defendant drove Cedric at gunpoint to an ATM. Cedric removed \$20 from the ATM for defendant.

After defendant and Cedric returned to the apartment from the ATM, defendant told Cedric he needed to take the truck for awhile to Las Vegas to retrieve some stolen drugs. Not wanting to accompany defendant, Cedric told defendant to go ahead and take the truck. Defendant and the other man left, taking the truck.

After defendant and his companion left, the Satchells discovered their phone line had been cut. The Satchells also discovered several of their jackets were missing. Defendant returned the truck a week later in a dirty and damaged condition.

Defendant's former fiancée testified that she spent February 28 and 29, from 9:00 or 10:00 p.m. until 5:30 or 6:00 in the morning, with defendant and he was driving a

black truck. He had also been driving the truck earlier in the afternoon on the 28th.

Another witness testified that, on February 27, he observed defendant receive the keys to a black truck from a man and a woman in exchange for a bag of marijuana. The man and woman then departed in a red Mustang. The witness got a ride from defendant in the black truck. Cedric's mother owned a red Mustang. On cross-examination, Cedric denied he had ever sold marijuana or allowed defendant to use his truck in exchange for marijuana.

## 2. Jurisdiction to Raise a Section 654 Challenge

On remand, the trial court rejected defendant's section 654 challenge on the ground the court did not have jurisdiction to change the sentence other than, as instructed by this court in the first appeal. After this court issued its written decision, defendant raised the section 654 objection for the first time in his petition for rehearing, which this court denied. Defendant also raised the issue in his petition for Supreme Court review, which was also denied.

Defendant argues that by remanding the matter for resentencing on the count 1 enhancement, the lower court had jurisdiction to correct the section 654 error even though it was not raised in the first appeal. Defendant claims the unauthorized sentence is subject to judicial correction at any time. The People disagree. Citing *People v.*

*Murphy*,<sup>2</sup> they argue this court's disposition on appeal expressly limited the lower court's jurisdiction on remand to resentencing on count 1 and vacating the count 5 prison term.

In *People v. Murphy*, the Court of Appeal remanded the case to the trial court for a determination of whether any of the defendant's prior strike convictions should be stricken under *People v. Superior Court (Romero)*.<sup>3</sup> On remand, the trial court refused to vacate any of the defendant's prior strike convictions and upheld the previously imposed sentence. The defendant appealed the ruling and the court of appeal affirmed, concluding the trial court did not abuse its discretion in refusing to vacate the strike findings.

The *Murphy* court rejected the defendant's newly raised section 654 objection to the sentence on the ground the defendant "is precluded by the nature of [the court of appeal's] limited remand from challenging his sentence in any other respect."<sup>4</sup> The *Murphy* court concluded the trial court did not have jurisdiction to hear the matter since the trial court refused to vacate any of the defendant's strikes and therefore the sentence was not before the trial court for purposes of resentencing.<sup>5</sup> *Murphy* is distinguishable since in the instant case the sentence was before the trial court on remand.

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<sup>2</sup> *People v. Murphy* (2001) 88 Cal.App.4th 392.

<sup>3</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.

<sup>4</sup> *People v. Murphy, supra*, 88 Cal.App.4th 392, 394.

<sup>5</sup> *People v. Murphy, supra*, 88 Cal.App.4th 392, 396-397.

In *People v. Price (Price II)*,<sup>6</sup> the court noted that a sentence in violation of section 654 constitutes an unauthorized sentence in which the sentencing error can be raised at any time, including on remand. “We find an incorrect application of section 654 produces an unauthorized sentence which may be rectified on remand. [¶] The erroneous failure to stay punishment under section 654 may be raised on the reviewing court’s own motion and corrected by the appellate court. [Citation.] . . . [¶] The requirements of section 654 are mandatory. Incorrect application flows from the trial court’s erroneous belief the court was legally mandated to act in a certain way, not from the trial court’s defective attempt to mitigate punishment within its discretion. . . . ‘Multiple sentences forbidden by the code, whether consecutive or concurrent, impose excessive punishment beyond the power of the sentencing court.’ [Citation.]”<sup>7</sup>

Although defendant’s resentencing was specifically limited on remand to increasing the armed use enhancement on count 1 to the maximum 10-year term and vacating the sentencing on count 5, the trial court had jurisdiction to consider the section 654 objection since it involved an unauthorized sentence. We thus conclude the trial court had jurisdiction, as this court does, to consider the issue.

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<sup>6</sup> *People v. Price (Price II)* (1986) 184 Cal.App.3d 1405.

<sup>7</sup> *People v. Price (Price II)*, *supra*, 184 Cal.App.3d 1405, 1411-1412, italics omitted, footnote omitted.

### 3. Section 654 Challenge

Defendant contends imposition of consecutive prison terms for kidnapping in furtherance of committing the \$40 robbery (count 1), residential robbery at Cedric's apartment (count 4), ATM robbery (count 8), and carjacking (count 9) constitutes impermissible dual punishment under section 654 and thus the prison terms for counts 1, 4, and 8 must be stayed. The People argue the kidnapping and robberies involved different intents and objectives and thus section 654 does not apply.

Section 654 bars multiple punishment for the same criminal act and for an indivisible course of conduct committed pursuant to the same criminal intent or objective.<sup>8</sup>

On appeal the burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives. The sentence imposed will not be overturned on appeal merely because reasonable minds might disagree. We are not authorized to substitute our judgment for that of the trial judge.<sup>9</sup>

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<sup>8</sup> Section 654.

<sup>9</sup> Section 215, subdivision (c); *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 979-980; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 420.

Defendant notes that, in concluding there was sufficient evidence to support a carjacking conviction, we stated in our previous appellate decision<sup>10</sup> in this case that the robbery and kidnapping offenses occurred during the course of the carjacking. We stated: “As the prosecutor argued in his closing statement, the carjacking began when [Cedric] first returned to his apartment and defendant took possession of the keys to the truck from [Cedric]. The carjacking continued as they drove to the mother’s house, back to the Satchells’ apartment, to an ATM machine, and finally returned again to the apartment.” Defendant argues imposition of terms for the carjacking, kidnapping, and the robberies constituted impermissible dual punishment under section 654 since, according to this court, the offenses all occurred during the commission of the carjacking.

This court is placed in the position of deciding the section 654 issue after the previous appeal during which the section 654 issue was not raised. As a consequence, the language in our previous decision regarding the sufficiency of the carjacking evidence did not take into account section 654. While we acknowledge language in our previous decision creates the appearance of a 654 violation, we are not precluded in this appeal from viewing the carjacking evidence in manner more favorable to the trial court’s sentence. In addressing the sufficiency of evidence issue relating to the carjacking conviction, we provided one but not necessarily the only reasonable construction of the evidence supporting the carjacking conviction. We recognize in retrospect that view of the evidence may have been overly broad since we did not consider the impact of such

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<sup>10</sup> *People v. Wilson* (Dec. 13, 2001, E027271) [nonpub. opn.].



construction of the facts on defendant's sentence. Now that defendant has raised the section 654 objection, we are required to consider whether there is any other way of reasonably construing the evidence in favor of upholding defendant's sentence.<sup>11</sup>

Viewing the evidence in the light most favorable to upholding the sentence, we conclude the kidnapping, ATM robbery, and carjacking offenses involved different intents and objectives and thus section 654 does not apply. But the first robbery of Cedric at his apartment, when defendant took Cedric's truck keys, was incidental to the carjacking<sup>12</sup> and thus section 654 applies to the robbery offense (count 4). Defendant cannot be punished for both the robbery and the carjacking.<sup>13</sup> After robbing Cedric, defendant formed the new objective and intent of forcing Cedric to get money from Cedric's mother. In furtherance of this objective, defendant kidnapped Cedric at gun point, drove defendant to Cedric's mother's home in Cedric's truck, and ordered Cedric to get some money from his mother.

During the first appeal, we reversed count 5, in which defendant was convicted of residential robbery based on defendant forcing Cedric to give defendant the \$40 Cedric's mother had given him. We concluded that, while defendant committed a robbery, it was not a residential robbery since defendant took the money from Cedric while in the truck.

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<sup>11</sup> *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th 968, 979-980.

<sup>12</sup> *People v. Dominguez*, *supra*, 38 Cal.App.4th 410, 420.

<sup>13</sup> *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1133.

There being no prison term imposed for the robbery, imposing a prison term for the related kidnapping offense does not constitute dual punishment.

While defendant used Cedric's truck to transport Cedric to his mother's home, the trial court could reasonably conclude the intent and objective of kidnapping Cedric for the purpose of getting money from Cedric's mother arose separately and independently from the carjacking offense.<sup>14</sup> A carjacking conviction requires a taking, or caption, and asportation of the vehicle. A taking and asportation are defined in *People v. Alvarado*<sup>15</sup> as occurring "when the offender secures dominion over the property, while a carrying away requires some slight movement away of the property."<sup>16</sup> The court further notes the perpetrator does not have to have physical possession of the property for there to be a taking.<sup>17</sup> "There is a caption when the defendant takes possession; he takes possession when he exercises dominion and control over the property. There is an asportation when he carries away the property. . . ."<sup>18</sup>

A reasonable fact finder could find that the taking of Cedric's truck occurred when defendant exercised dominion and control over the truck by taking Cedric's truck keys with the intent of driving the truck to Las Vegas after defendant was done robbing the

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<sup>14</sup> *People v. Alvarado* (1999) 76 Cal.App.4th 156.

<sup>15</sup> *People v. Alvarado, supra*, 76 Cal.App.4th 156.

<sup>16</sup> *People v. Alvarado, supra*, 76 Cal.App.4th 156, 161.

<sup>17</sup> *People v. Alvarado, supra*, 76 Cal.App.4th 156, 161.

Satchells. The asportation occurred when defendant drove the truck to Las Vegas. Thus, although defendant used the truck during the kidnapping and ATM robbery offenses, the carjacking offense can be reasonably construed as occurring independently of those separate offenses.

Imposing a separate, consecutive sentence for the kidnapping offense committed for the purpose of the \$40 robbery was thus proper under section 654 and did not constitute dual punishment.

The ATM robbery could also be construed as a separate offense. After taking Cedric's mother's money and returning to Cedric's apartment, defendant formed the new objective and intent of forcing Cedric to take money from his ATM account. Sentencing defendant for this separate offense also does not constitute dual punishment under section 654. Even though defendant used Cedric's truck for transportation this does not preclude sentencing defendant for committing the separate ATM robbery offense.

Viewing the evidence in the light most favorable to upholding the sentence, we conclude the only instance of improper dual punishment under section 654 consisted of sentencing defendant to consecutive terms for the robbery of Cedric at his apartment and the carjacking, when defendant took Cedric's truck keys. The kidnapping, committed in furtherance of taking \$40 from Cedric's mother, and the ATM robbery were properly sentenced as separate offenses. The evidence can reasonably be construed as establishing defendant formed new, separate intents and objectives in committing the carjacking

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*[footnote continued from previous page]*

<sup>18</sup> *People v. Alvarado, supra*, 76 Cal.App.4th 156, 162.

(count 9), kidnapping (count 1), and ATM robbery (count 8), and thus the court did not abuse its discretion in imposing separate, consecutive terms for each of these offenses.

4. Disposition

The judgment is modified to stay the term imposed for the residential robbery in count 4 pursuant to section 654.<sup>19</sup> In all other respects the judgment is affirmed. The clerk of the superior court is ordered to prepare and forward to the Department of Corrections a corrected abstract of judgment modifying the sentence.

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/s/ Gaut  
J.

We concur:

/s/ Richli  
Acting P.J.

/s/ Ward  
J.

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<sup>19</sup> *People v. Dominguez, supra*, 38 Cal.App.4th 410, 420.